RECEIVED
OCT 15 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

79-5307

79-5307

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

---

NO. _____ MISC.

---

THE PEOPLE OF THE STATE OF COLORADO,

~~PETITIONER~~-APPELLEE,

IN THE INTEREST OF D. A. K.

MINOR CHILD

~~AND CONCERNING~~ J. K. S.,

~~RESPONDENT~~-APPELLANT

---

ON APPEAL FROM THE

SUPREME COURT OF THE

STATE OF COLORADO

---

# JURISDICTIONAL STATEMENT

---

James A. Burke
Lenny L. Croce
William P. Bethke
Attorneys for Respondent-Appellant
Rural Legal Services of Tennessee, Inc.
P.O. Box 3358
Oak Ridge, Tennessee 37830

John Marshall
Jefferson County Legal Aid
1621 Arapahoe
Golden, Colorado 80401

## TABLE OF CONTENTS


| | PAGE: |
|---|---|
| TABLE OF AUTHORITIES | ii |
| JURISDICTIONAL STATEMENT | 1 |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED. | 3 |
| QUESTION PRESENTED | 4 |
| STATEMENT OF THE CASE | 4 |
| THE QUESTION PRESENTED IS SUBSTANTIAL | 6 |
| A. A parent's right to the companionship, care, custody and management of her child is a fundamental right protected by the due process clause of the Fourteenth Amendment of the United States Constitution. | 8 |
| B. The constitutional doctrines of vagueness and overbreadth apply to neglect and dependency statutes which affect and may deprive parents of their fundamental right to the companionship, care, custody and management of their children | 10 |
| C. The increasingly intrusive and extensive regulation of parental conduct by the states without legislatively fixed standards should be subjected to constitutional restraint | 14 |
| D. The Colorado Statutes for neglected and dependent children are constitutionally deficient due to unclear and ambiguous language and due to the absence of any clear ascertainable standards with which to measure any parental conduct or practice | 16 |
| CONCLUSION | 18 |
| APPENDIX A | A1 |
| APPENDIX B | B1 |
| APPENDIX C | C1 |


## TABLE OF AUTHORITIES

### TABLE OF CASES


| | PAGE: |
|---|---|
| A.B. Small Co. v. American Sugar Ref. Co. 267 U.S. 233 (1925) | 11 |
| Allen v. Huffman, 307 P.2d 802 (Colo. 1957). | 9 |
| Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd 545 F.2d 1137 (8th Cir 1976) | 17 |
| Amalgamated Food Employees Union Local 590, et al. v. Logan Valley Plaza, Inc., et al., 391 U.S. 308 (1967). | 2 |
| Aptheker v. Sec. of State, 378 U.S. 500 (1964) | 13 |
| Bouie v. Columbia, 378 U.S. 347 (1964) | 16 |
| Central R.R. Company of Penn. v. Comm. of Penn., 370 U.S. 607 (1962) | 2 |
| Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) | 9 |
| Connally v. General Construction Co., 269 U.S. 385 (1926) | 16 |
| Devlin v. Huffman, 339 P.2d 1008 (Colo. 1959). | 9 |
| Edwards v. California, 314 U.S. 160 (1941) | 13 |
| Giaccio v. Penn., 382 U.S. 399 (1965). | 16 |
| Gibson v. Florida Legislative Investigation Commission, 372 U.S. 539 (1963). | 13 |
| Gooding v. Wilson, 405 U.S. 518 (1972) | 13 |
| Grayned v. City of Rockford, 408 U.S. 104 (1971) | 16 |
| Griswold v. Connecticut, 381 U.S. 479 (1965) | 9, 13 |
| Harmsen v. Fizzell, 351 Mich. 86 (1957). | 9 |
| In re Cooper, 248 A. 2d 384 (Md. App. 1968). | 15 |
| In re Gault, 387 U.S. 1 (1967) | 11 |
| In the Interest of D.A.K., Supreme Court of Colorado No. 28363, 596 P. 2d 747 (1979) and ___ P. 2d ___ (July 16, 1979) | passim |
| In re People in the Interest of K.S., 515 P. 2d 130 (Colo. App. 1972) | 15 |

TABLE OF CASES
(cont'd.)


| | PAGE: |
|---|---|
| In re People in the Interest of R.K., 505 P. 2d 37 (Colo. App. 1972) | 14 |
| In re Raya, 255 Cal. App. 2d 260, 63 Cal. Rep. 252 (1967) | 9 |
| In re Welfare of Karen, 159 N.W. 2d 402 (Minn. 1968) | 15 |
| In re Young, 270 N.Y.S. 2d 250 (Fam. Ct. 1966) | 14 |
| Jordon v. DeGeorge, 341 U.S. 223 (1951) | 11 |
| Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) | 12 |
| Levy v. Louisiana, 391 U.S. 68 (1968) | 2 |
| May v. Anderson, 345 U.S. 528 (1953) | 9 |
| Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555 (1963) | 2 |
| Meyer v. Nebraska, 262 U.S. 390 (1923) | 9 |
| Moody v. Moody, 211 So. 2d 842 (Miss. 1968) | 9 |
| Moore v. City of East Cleveland, ___U.S.___, 97 S.Ct. 1932 (1977) | 13 |
| N.A.A.C.P. v. Button, 371 U.S. 415 (1963) | 13 |
| Palko v. Connecticut, 302 U.S. 319 (1937) | 9 |
| Papachristou v. Jacksonville, 405 U.S. 156 (1972) | 17 |
| Robinson v. State of Florida, 378 U.S. 153 (1964) | 2 |
| Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976) | 15 |
| Roe v. Wade, 410 U.S. 113 (1973) | 13 |
| Scull v. Virginia, 359 U.S. 344 (1959) | 16 |
| Skinner v. Oklahoma, 316 U.S. 535 (1942) | 9 |
| Smith v. Organization of Foster Families for E. and Reform, ____U.S.____, 97 S. Ct. 2094 (1977) | 17 |
| Stanley v. Illinois, 405 U.S. 645 (1972) | 10 |
| United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921) | 16 |
| United States v. National Dairy Products, 372 U.S. 29 (1963) reh. den. 372 U.S. 961 (1963) | 16 |


TABLE OF CASES
(cont'd.)


| | PAGE: |
|---|---|
| Washburn v. Washburn, 49 Cal. App. 2d 581, 12 P. 2d 96 (1942) | 9 |
| Wisconsin v. Yoder, 406 U.S. 205 (1972) | 13 |
| Wright v. Georgia, 373 U.S. 284 (1963) | 16 |


STATUTES INVOLVED


| | |
|---|---|
| 28 U.S.C. §1257(2) | 2 |
| 28 U.S.C. §2103 | 3 |
| Colorado Revised Statutes 1973 | |
| §§19-1-101 et seq and 19-1-103 et seq | passim |
| §19-1-103(20) | passim |
| §19-1-104(c) | 3 |
| §19-3-101(2) | 3 |
| §19-3-106 | 3 |
| §19-3-111 | 3 |
| Idaho Code §16-1625 (1971) | 15 |


MISCELLANEOUS


| | |
|---|---|
| Amsterdam, "The Void-for-Vagueness Doctrine in the Supreme Court," 109 U. Pa. L. Rev. 67 (1960) | 18 |
| Comment, "Child Neglect - Due Process for the Parent," 70 Colo. L. Rev. 479 (1968). | 13 |
| Goldstein, Freud and Solnit, Beyond the Best Interest of the Child (1973) | 10 |
| Katz, When Parents Fail, Beacon Press (1971). | 15 |
| Kempe, Silverman, Droegemueller and Silver, "The Battered Child Syndrome," 181 J. of Amer. Med. Assoc. 17 (July 7, 1962) | 14 |
| Mnookin, "Foster Care - In Whose Best Interest," 43 Harv. Ed. Rev. 624 (Nov. 1973) | 10 |

MISCELLANEOUS
(cont'd.)


| | PAGE: |
|---|---|
| National Juvenile Law Center, Law and Tactics in Juvenile Cases, 2d Ed. . . . . | 14 |
| Newberger and Boume, "The Medicalization and Legalization of Child Abuse," 48 (4) Amer. J. Orthopyschiatry 593 (Oct. 1978) | 14 |
| Sullivan, "Child Neglect: The Environmental Aspects," 29 Ohio St. L. J. 92 (1968) . . | 12 |


IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

---

NO. _____ MISC.

---

THE PEOPLE OF THE STATE OF COLORADO,

PETITIONER-APPELLEE,

IN THE INTEREST OF D. A. K.

MINOR CHILD

AND CONCERNING J. K. S.,

RESPONDENT-APPELLANT

---

ON APPEAL FROM THE

SUPREME COURT OF THE

STATE OF COLORADO

---

## JURISDICTIONAL STATEMENT

Pursuant to United States Supreme Court Rules 12(2) and 15, appellant submits this statement of the basis for jurisdiction of the Supreme Court of the United States on direct appeal from the ruling of the Colorado Supreme Court, affirming the judgment of the District Court of Jefferson County, State of Colorado, and the reasons for exercise of such jurisdiction in this case.

## OPINIONS BELOW

The opinions of the Supreme Court of the State of Colorado affirming the judgment of the District Court of Jefferson County, State of Colorado, are reported at 596 P.2d 747 and ____P.2d ____ and attached as Appendix A.

## JURISDICTION

This appeal is taken from the final judgment in a proceeding to adjudicate a child dependent and neglected under the Colorado Children's Code, Sections 19-1-101, et seq., and 19-3-101 et seq. Colorado Revised Statutes (C.R.S) 1973, attached as Appendix B.

The decision of the Colorado Supreme Court was rendered on June 4, 1979, and rehearing denied on July 16, 1979. Notice of appeal was filed in the District Court of Jefferson County, State of Colorado, (court possessed of the record) and served upon the Clerk of the Supreme Court of Colorado on October 10, 1979.

The Supreme Court of the United States has jurisdiction to review the ruling of the Colorado Supreme Court by direct appeal pursuant to 28 U.S.C. § 1257(2) in that appellant asserts that a state statute is repugnant to the Constitution of the United States and the Colorado Supreme Court upheld that statute's validity. See, Levy v. Louisiana, 391 U.S. 68 (1968); Mercantile National Bank at Dallas v. Langdeau, 371 U.S.555 (1963); Robinson v. State of Florida, 378 U.S. 153 (1964); Amalgamated Food Employees Union Local 590, et al. v. Logan Valley Plaza, Inc., et al., 391 U.S. 308 (1967); Central R.R. Company of Penn. v. Comm. of Penn., 370 U.S. 607 (1962).

In the event the Court does not consider appeal the proper mode of review appellant requests this jurisdictional statement be acted upon as a petition for certiorari pursuant to 28 U.S.C. § 2103.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a challenge, under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, to the validity of Section 19-1-103(20) C.R.S. 1973, which states:

> "Neglected or dependent child" means a child:
> (a) Whose parent, guardian, or legal custodian has abandoned him or has subjected him to mistreatment or abuse or whose parent, guardian, or legal custodian has suffered or allowed another to mistreat or abuse the child without taking lawful means to stop such mistreatment or abuse and prevent it from recurring;
> (b) Who lacks proper parental care through the actions or omissions of the parent, guardian, or legal custodian;
> (c) Whose environment is injurious to his welfare;
> (d) Whose parent, guardian, or legal custodian fails or refuses to provide proper or necessary subsistence, education, medical care, or any other care necessary for his health, guidance, or well-being; or
> (e) Who is homeless, without proper care, or not domiciled with his parent, guardian, or legal custodian through no fault of his parent, guardian, or legal custodian.

No other definition of dependency or neglect exists in Colorado statutes or case law, nor was any more definite standard provided by either court in this case.

Families found to have dependent or neglected children are subject to encroachment by the state into familial autonomy and integrity which, at its extreme, results in the dissolution of the family by permanently removing the child from the home and legally severing parental rights. Sections 19-1-104(c), 19-3-101(2), 19-3-106 and 19-3-111, C.R.S. 1973.

## QUESTION PRESENTED

Whether Colorado's dependency and neglect definitional statute, Section 19-1-103(20) C.R.S. 1973, offends the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that it is so vague that it fails to provide adequate notice of its meaning and the scope of its application and so overbroad that it threatens to inhibit the exercise of fundamental rights of parents and to allow undue interference by the state into the integrity of the family?

## STATEMENT OF THE CASE

The proceedings from which this appeal arises began with a neglect and dependency petition brought "in the interest of D.A.K., minor child." The petition was brought in the District Court of Jefferson County, State of Colorado, by the Jefferson County Department of Social Services and named J.K.S., the child's mother, as respondent.

The petition was filed on February 27, 1975 and alleged that "the parent . . . has subjected the child herein to mistreatment or abuse" . . . and that the child "lacks proper parental care through the actions or omissions of the parent" . . . and that the "parent . . . fails or refuses to provide proper or necessary subsistence, education, medical care or any other care necessary for his health, guidance or well-being." These vague allegations were directly quoted from Section 19-1-103(20) C.R.S. 1973.

By preliminary motions, the various grounds for neglect and dependency raised by petitioner were reduced to those consisting solely of "emotional abuse":

> In this case no physical abuse of the child was alleged or proved. Rather the petition and bill of particulars set forth specific allegations of emotional abuse . . . .

In the Interest of D.A.K., Supreme Court of Colorado, No. 28363 (June 4, 1979), Appendix A., at A-5.

Respondent moved the trial court to dismiss the petition on grounds that Section 19-1-103(20) C.R.S. 1973 was vague and overbroad on its face and as applied in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The court denied the motion to dismiss, specifically ruling that Section 19-1-103(20) C.R.S. 1973 was constitutional.

At trial respondent J.K.S. requested and proposed an instruction defining emotional abuse with particularity. See, Proposed Instruction attached as Appendix C. The trial court denied the proposed instruction, perhaps because no definition of emotional abuse is provided by statute. Indeed, the Colorado neglect and dependency statute, Sections 19-1-101 et seq. and 19-3-101 et seq., C.R.S. 1973, nowhere mentions emotional abuse.

After trial, on October 28, 1976, the jury found D.A.K. to be a dependent and neglected child. Following a dispositional hearing on November 8 and 9, 1977, the court issued a Dispositional Order, on January 3, 1978, terminating appellant's parental rights. Appellant moved for a new trial, raising the statute's unconstitutional vagueness and overbreadth as grounds. This motion was denied on April 6, 1978.

Appellant filed Notice of Appeal to the Colorado Court of Appeals on May 2, 1978. Because the constitutionality of a state statute was questioned, the case was transferred to the Colorado Supreme Court on September 11, 1978.

The Supreme Court accepted jurisdiction and oral arguments were heard on December 12, 1978. On June 4, 1979, the Supreme Court of the State of Colorado issued its ruling affirming the judgment of the District Court. The court specifically ruled that Section 19-1-103(20) C.R.S. 1973 was not unconstitutionally vague or overbroad.

> [R]espondent next argues that Section 19-1-103(20)(a) . . . is so vague and uncertain that it fails to meet the constitutional requirements for statutory definiteness . . . . We do not agree . . . . While acknowledging that the possible consequences of adjudicating a child to be neglected or dependent can be grave, we hold that the statute gives the parents sufficient notice of the kinds of conduct which could result in their losing parental rights.

In the Interest of D.A.K., Supreme Court of Colorado, No. 28363 (June 4, 1979), Appendix A, at A-5.

Appellant petitioned for rehearing on July 2, 1979, specifically raising the issues of vagueness and overbreadth. The Supreme Court of Colorado denied the Petition for Rehearing on July 16, 1979, without addressing the issues of vagueness and overbreadth, and again upholding the statute See, In the Interest of D.A.K., Supreme Court of Colorado, No. 28363 (July 16, 1979), Appendix A., at A-16.

## THE QUESTION PRESENTED IS SUBSTANTIAL

As construed by Colorado's highest court, the Colorado neglect and dependency statutes, and specifically Section 19-1-103(20) C.R.S. 1973, allow a court to remove a child from its parent or guardian and terminate the parent-child relationship based on emotional abuse. The appellant mother in this case recognizes that emotional abuse can be as damaging to a child as physical abuse and acknowledges the state's interest in protecting children from such abuse. However, emotional abuse by its nature is a complex subject which demands inquiry into a family's most intimate beliefs, mores, standards and culture. Only the most specific statutes and standards should govern when and what state interference is appropriate.

Acceptable statutes have been drafted in other states. However, Colorado's statute does not meet applicable constitutional standards and, as the result in this case shows, the protection of fundamental rights is delegated to welfare workers, judges and juries for resolution on a standardless, ad hoc basis. The failure of the statutory language to include or define emotional abuse as grounds for finding a child neglected and dependent and, ultimately, to terminate the parent-child relationship violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because of vagueness and overbreadth.

Caretakers of children across the United States are subject to the sanctions available under dependency and neglect statutes. More particularly, the mother here, J.K.S., had her parental rights terminated by the State of Colorado because her child, D.A.K., was found to be dependent and neglected as a result of "emotional abuse" from his mother, even though, at trial, no resulting harm was shown and none was required to be found under the statute or by the courts.

The problems of abused children have become a matter of intense public interest and debate in recent years. Child abuse is now recognized to be more widespread than previously thought, and to cut across lines of race, economic status and culture. The "battered child syndrome" is now believed to be the cause of many serious problems among adults, including criminal behavior, emotional illness and abuse of the victim's own children.

As a result of this fast-growing interest (often resulting from public outcry following notorious local cases of physical abuse), welfare agencies, police departments and courts have understandably become much more willing to remove children from their families. State authorities now inquire into and interfere with the parent-child relationship to an unprecedented degree.

Much of this attention is long overdue, but the potential dangers are obvious. Now, as state authorities expand their interest into the area of emotional abuse, fundamental constitutionally protected aspects of the parent-child relationship are threatened. Without the guidance of clear statutory standards, overreaction in the face of intense public pressure has begun to stimulate a degree of interference with family life that could cause more serious, lasting harm to children than that sought to be avoided.

The mother in this case, who has now been without her child for over three years due to her "conduct" constituting "emotional abuse" absent a clear showing of resulting harm to her child, asks this Court to examine the statutory standards governing state interference in response to such behavior.

A. A parent's right to the companionship, care, custody and management of her child is a fundamental right protected by the due process clause of the Fourteenth Amendment of the United States Constitution.

Deeply rooted in the traditions and conscience of the American people are those liberties that are so important as to be ranked as fundamental and deserving of protection through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Palko v. Connecticut, 302 U.S. 319, 325 (1937). See also, Griswold v. Connecticut, 381 U.S. 479, 481-485 (1965); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-640 (1974). A parent's companionship and management of children is such a liberty.

This Court has frequently emphasized the importance of the parent's right to the companionship, care, custody and management of their children. This right has been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923); and recognized as "one of the basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); and "far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533 (1953).[1/] This right cannot be unreasonably or impermissibly interfered with by the State.

---

[1/] Courts throughout the country have recognized the importance of the family relationship: "There is no satisfactory substitute for a mother's love . . . ." Washburn v. Washburn, 49 Cal.App.2d 581,588, 12 P.2d 96, 100, (1942); "A dominant parental right to custody of the child pervades our law," In Re Raya, 255 Cal.App.2d 260, 63 Cal.Rep. 252 (1967); "the presumption in all cases is that the child's parents will love it most and care for it best," Moody v. Moody, 211 So. 2d 842 (Miss. 1968); "We are not unmindful of the fact that a father . . . should be given society's assistance at every point in his effort to re-establish a proper home for the children for whose care he has the right and duty to provide," Harmsen v. Fizzell, 351 Mich. 86, 110 (1957). See, Allen v. Huffman, 307 P.2d 802 (Colo.1957); Devlin v. Huffman, 339 P.2d 1008 (Colo. 1959).

In Stanley v. Illinois, 405 U.S. 645, 651 (1972), the Court stated:

> It is plain that the interest of a parent in the companionship, care, custody and management of his or her children come[s] to this court with a momentum of respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. (Citation omitted).

The Colorado Supreme Court explicitly acknowledged the fundamental protected right of parents by its own opinion in In the Interest of D.A.K.:

> [T]he parent has much at stake in the outcome of the proceeding. Once the child is adjudicated to be neglected or dependent the court may take various actions including entry of a decree terminating the legal relationship of parent and child. Section 19-3-111(2). Thus, although no criminal sanction is involved, a serious and substantial parental interest is at stake, which in many, if not most, cases is as important to the parents as their freedom.

In the Interest of D.A.K., Supreme Court of Colorado, No. 28363 (June 4, 1979), Appendix A, at A-4.

Similarly, a child has a fundamental, substantial interest in the outcome of neglect and dependency proceeding since "it is generally assumed that separation carries substantial risks for the child . . ." Mnookin, "Foster Care -- In Whose Best Interests?", 43 Harv. Ed. Rev. 624 (Nov. 1973). See, Goldstein, Freud, and Solnit, Beyond the Best Interests of the Child (1973).

Thus, for both the parents and the child, the rights of familial companionship and parental custody and control have been recognized a fundamental constitutionally protected interest.

B. The constitutional doctrines of vagueness and overbreadth apply to neglect and dependency statutes which affect and may deprive parents of their fundamental right to the companionship, care, custody and management of their children.

The void-for-vagueness and overbreadth doctrines apply to civil statutes. In A. B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233 (1925), this Court held:

> The ground or principle of the [vagueness] decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.

Supra, 239. See also, Jordan v. DeGeorge, 341 U.S. 223, 231 (1951).

Moreover, the strict standards of statutory definiteness and scope required of penal statutes and statutes potentially infringing on constitutional rights should apply to dependency and neglect statutes.

When considering the constitutional rights of parties in juvenile proceedings, substance cannot be disregarded "because of the feeble enticement of the 'civil' label of convenience attached to juvenile proceedings." In Re Gault, 387 U.S. 1, 50 (1967). Several fundamental aspects of neglect cases indicate that the "civil" label attached to neglect statutes conceals the seriousness of neglect adjudications.

In a neglect proceeding the state asserts its weight and immense resources on behalf of the public against the parent. Although in theory the state acts to protect the child, the parent is summoned to answer the full force of the state's contention that the parent has engaged in some misconduct. As such, the state's function in a neglect case approaches more closely the state's traditional role in criminal rather than civil proceedings.

A neglect adjudication imposes harsh consequences upon both the parent and child.

> A neglect or dependency proceeding is not intended to punish the parent for conduct involving the child. However, we recognize that the parent has much at stake in the outcome of the proceeding. Once the child is adjudicated to be neglected or dependent the court may take various actions including entry of a decree terminating the legal relationship of parent and child. Section 19-3-111(2). Thus, although no criminal sanction is involved, a serious and substantial parental interest is at stake, which in many, if not most, cases is as important to the parents as their freedom.

In the Interest of D.A.K., Supreme Court of Colorado, No. 28363 (June 4, 1979), Appendix A, at A-8.

Parental conduct for which a child may be declared neglected may also constitute grounds for criminal prosecution against the parent for contributing to the neglect or delinquency of a child or for child abuse. In essence, parents in neglect cases are alleged to have engaged in conduct which may constitute a crime. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

Although courts ritually recite their intentions to act in the child's best interest, neglect adjudications typically reflect court disapproval of parental conduct rather than any consideration of whether the child will be endangered by allowing him to remain in parental custody. Sullivan, "Child Neglect: The Environmental Aspects," 29 Ohio St. L. J. 92 (1968). This becomes poignantly clear in the instant case where the Colorado Supreme Court narrowly focuses upon the conduct of the respondent mother, J.K.S., in dismissing the constitutional challenge for vagueness:

> Fundamental fairness does not require a statute to enumerate in all-encompassing examples, or exactly described acts, precisely how poorly a parent can treat a child before risking loss of parental rights. [Citation omitted] Our legal system occasionally requires courts to draw lines. In any event, the conduct [of] J.K.S. here involved would clearly qualify as emotional abuse even if such parameters more accurately defining emotional abuse were required. [Emphasis added]

In the Interest of D.A.K., Supreme Court of Colorado, No. 28363 (June 4, 1979), Appendix A, at A-8.

"Taken together, the aforementioned features of neglect proceedings present a picture hardly distinguishable from criminal prosecution." Comment, "Child Neglect-Due Process for the Parent," 70 Col. L. Rev. 479 (1970).

Furthermore, constitutional restrictions on statutory vagueness and overbreadth are applied strictly when fundamental rights, especially First Amendment rights, are implicated. N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Gooding v. Wilson, 405 U.S. 518 (1972). This strict application of the vagueness and overbreadth doctrines extends to "penumbral" First Amendment rights. Edwards v. California, 314 U.S. 160 (1941) (right to travel); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (right to travel); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) (right to free and private association). The right to private familial association is such a fundamental "penumbral" First Amendment right. Griswold v. Connecticut, 381 U.S. 479 (1965); Wisconsin v. Yoder, 406 U.S. 205 (1972); Roe v. Wade, 410 U.S. 113 (1973); Moore v. City of East Cleveland, ___U.S.___, 97 S.Ct. 1932 (1977)

For these reasons, neglect statutes should be tested by the same standards of definiteness required of criminal statutes and statutes implicating fundamental rights. Only then will parents be afforded the fundamental fairness which due process guarantees them.

C. The increasingly intrusive and extensive regulation of parental conduct by the states without legislatively fixed standards should be subjected to constitutional restraint.

With the advent of the medical diagnosis of "battered-child syndrome" in 1962, the public has become increasingly concerned to protect children from abusive and neglectful parents.[2/] See, Newberger and Boume, "The Medicalization and Legalization of Child Abuse," 48(4) Amer. J. Orthopychiatry, 593-607 (Oct. 1978). Responding to this public interest, legislatures enacted statutes to protect dependent and neglected children and defined "abuse" in terms of "mistreatment" or "parental cruelty." See, Law and Tactics in Juvenile Cases, 2nd Ed., National Juvenile Law Center, §§ 16.6 and 16.8.

Early court decisions concerning child abuse have focused upon cause and effect. The cause was some act or omission by the parent and the effect was physical harm to the child resulting in sudden death or "where the degree and type of injury is at variance with the history given regarding the occurrence of the trauma." Kempe, Silverman, Droegemueller, and Silver, "The Battered-Child Syndrome", 181 J. of Amer. Med. Assoc. 17 (July 7, 1962). See, In re Young, 270 N.Y.S. 2d 250 (Fam. Ct. 1966); In re People in the Interest of R.K., 505 P.2d 37 (Colo.App. 1972); In re People in the Interest of K.S., 515 P.2d 130 (Colo.App. 1973).

Courts and legislatures have more recently realized "that the emotional well-being of children is more important than their physical health." Katz, When Parents Fail (Beacon Press, 1971). Responding to the relatively new concept of emotional maltreatment, states began enacting or amending their children codes to include actions detrimental to the mental health of a child as ground for termination of parental rights. Some states have carefully defined "emotional abuse". See, e.g., Idaho Code § 16-1625 (1971) (condition of a child who has been denied proper parental love, or adequate affectionate parental association, and who behaves unnaturally and unrealistically in relation to normal situations, objects and other persons).[3/]

In the absence of statutory guidance, however, court actions based on emotional abuse have resulted in injustice. The psychological neglect category has been used to terminate parental rights in the situation where a child was in the home with other illegitimate children, In re Cooper, 248 A.2d 384 (Md.App. 1968); and where a mother was writing bad checks, In re Welfare of Karen, 159 N.W. 2d 402 (Minn. 1968). In Roe v. Conn , 417 F.Supp. 769 (M.D.Ala. 1976), an Alabama juvenile court used the justification of protecting a child's "health" -- presumably emotional health since no physical harm was shown -- to justify the removal of a white child from its mother because they were living in a black neighborhood. The district court in Roe v. Conn went on to declare the

---

2/Kempe, Silverman, Steele, Droegemueller, and Silver, "The Battered-Child Syndrome," 181 J. of Amer. Med. Assoc. 17 - 24 (July 7, 1962). Although courts, under the doctrine of parens patriae, had long imposed sanctions upon parents who had unreasonably physically abused their children, the medical profession and other fields had not recognized the phenomenon of child abuse as a disease or a clinical diagnosis. The work and study by Dr. Kempe and others resulted in the identification of clinical manifestations of physically abused children described as the "battered-child syndrome." The recognition of physical child abuse by the medical profession as a condition which could be diagnosed has significantly heightened the public's awareness of the

3/According to the National Center for Child Abuse in Washington, D.C., more than 45 states refer to emotional maltreatment, using different terms for this form of child abuse or neglect.

Alabama statutes applied in that case unconstitutionally vague.

Increasing recent awareness of child abuse has been accompanied by violations of fundamental rights when the standards for dependency and neglect are vague or of sweeping application. Such violations create a need for delineating the constitutional requirements for valid dependency and neglect statutes.

D. The Colorado Statutes for neglected and dependent children are constitutionally deficient due to unclear and ambiguous language and due to the absence of any clear ascertainable standards with which to measure any parental conduct or practice.

The Due Process Clause of the Fourteenth Amendment requires statutes to meet three basic requirements of definiteness and scope: (1) the statute's language must be sufficiently specific so that a person of ordinary intelligence need not guess at its meaning; (2) the statute must contain standards by which it may be applied in a non-discriminatory fashion; and (3) the statute must not sweep so broadly that it proscribes or inhibits constitutionally protected interests. Grayned v. City of Rockford, 408 U.S. 104 (1971). See, Connally v. General Construction Company, 269 U.S. 385 (1926); United States v. L. Cohen Grocery, 255 U.S. 81 (1921).

If the statute fails to give a person of ordinary intelligence fair notice of the illegality of his contemplated act, it is unconstitutional. Wright v. Georgia, 373 U.S. 284 (1963); Bouie v. Columbia, 378 U.S. 347 (1964); Scull v. Virginia, 359 U.S. 344 (1959); United States v. National Dairy Products, 372 U.S. 29 (1963) reh. den., 372 U.S. 961 (1963).

Thus, in Giaccio v. Pennsylvania, 382 U.S. 399, 404 (1965), the Court held:

> It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct' or 'reprehensible misconduct'.

Similarly, in Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10, 18 (S.D.Iowa 1975) aff'd. 545 F.2d 1137 (8th Cir. 1976) the court held an Iowa parental rights termination statute unconstitutionally vague, stating that:

> The standards of 'necessary parental care and protection', . . . and of '[parental] conduct detrimental to the physical or mental health or morals of the child', . . . are susceptible to multifarious interpretations which prevent the ordinary person from knowing what is and is not prohibited. An examination of these phrases will not inform an ordinary person as to what conduct is required or must be avoided in order to prevent parental termination.

By the same reasoning, Section 19-1-103(20) C.R.S. 1973 as amended does not provide adequate warning of what conduct is proscribed or mandated.

The Colorado statute also fails to provide standards to guide social workers, judges, and juries in determining what conduct or condition is, or is not, dependency or neglect. The vagueness of the Colorado neglect statute thus permits social workers, courts and juries to make highly subjective determinations on the appropriate application of the statute to specific families. The great discretion thus given administrative agencies and the judiciary frequently results in, as this Court has recognized, "class based intrusion[s] into the family life of the poor," because of "a bias that . . . the natural parents' poverty and lifestyle [are] prejudicial to the best interests of the child." Smith v. Organ. of Foster Families for E. and Reform, ___ U.S.__, 97 S.Ct. 2094, 2104 - 2105 (1977) (citations omitted). See also, Papachristou v. Jacksonville, 405

U.S. 156 (1972); Amsterdam "The Void-for-Vagueness Doctrine in the Supreme Court," 109 U.Pa. L. Rev. 67 (1960).

Finally, the Colorado dependency and neglect statute infringes upon constitutionally protected conduct. The scope of parental rights is nowhere exhaustively defined. However, at a minimum, they include the right to the care, custody, and control of the child, the right to discipline the child, and the right to control the child's religious and moral education. The manner and method of exercising these parental rights and responsibilities varies from "permissiveness" to "strict disciplinarianism."

In this case the Colorado statute resulted in an accusation, jury instructions, and findings of neglect and dependency based solely upon emotional abuse without any definition or standard for that term and without any evidence, inquiry, or apparent concern for actual emotional harm to the child D.A.K. Such broad authorization for intervention in individual lives is not constitutionally permissible.

## CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

James A. Burke
Lenny L. Croce
William P. Bethke
Attorneys for Respondent-Appellant
Rural Legal Services of Tennessee, Inc.
P.O. Box 3358
Oak Ridge, Tennessee 37830

John Marshall
Jefferson County Legal Aid
1621 Arapahoe
Golden, Colorado 80401